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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CHARLES SKIDMORE,

Plaintiff and Appellant,

v.

SUTTER'S PLACE, INC., dba BAY 101,

Defendant and Respondent.

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H027859

(Santa Clara County Superior Court No. 01-03-CV-000194)

Plaintiff Charles Skidmore was employed by defendant Sutter's Place, Inc., doing business as Bay 101 (Bay 101). After receiving a demotion, Skidmore brought an action against Bay 101 for age discrimination under the Fair Housing and Employment Act (FEHA). (Gov. Code, § 12900 et seq.) The trial court granted Bay 101's motion for summary judgment and dismissed the action. We affirm.

I. Discussion

A. Age Discrimination Claims

The FEHA prohibits an employer from discriminating on the basis of age. (Gov. Code, § 12940.) In California, courts employ the three-prong test that was established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*) to resolve discrimination claims, including age

discrimination. (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 354.) First, the employee must establish a prima facie case of discrimination. (*Id.* at p. 354.) The employee "must at least show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion." (*Id.* at p. 355, internal citations and quotation marks omitted.) Thus the employee must establish: "(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Ibid.*) Once the employee satisfies this burden, there is a presumption of discrimination, and the burden then shifts to the employer to show that its action was motivated by legitimate, nondiscriminatory reasons. (*Id.* at pp. 355-356.) A reason is "legitimate" if it is "*facially unrelated to a prohibited bias*, and which if true, would preclude a finding of *discrimination*." (*Id.* at p. 358.) If the employer meets this burden, the employee then must show that the employer's reasons are pretexts for discrimination, or produce other evidence of intentional discrimination. (*Id.* at p. 356.)

B. Summary Judgment in Age Discrimination Cases

When an employer brings a motion for summary judgment in an age discrimination case, and the employer "presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.) Once the employer meets its burden in the summary judgment motion,

"the employee must demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action." (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038 (*Cucuzza*).)

"Appellate review of a ruling on a summary judgment or summary adjudication motion is de novo." (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210.)

C. Issue Framed by the Pleadings

Skidmore's complaint alleges: (1) he was over 40 years old; (2) he had performed his job in a consistently satisfactory manner at Bay 101; (3) Bay 101 demoted him from casino manager to casino shift manager; and (4) Bay 101 demoted him based on his age.

D. Bay 101's Showing

Bay 101 asserted that Skidmore's demotion was based on legitimate, nondiscriminatory reasons by submitting declarations that outlined the following. Bay 101 is a card room in San Jose. Mark Trapani is one of the owners and the executive vice president of Bay 101. In September 1993, Bay 101 hired Skidmore and Stanley Seiff as part of its management team. Seiff had previously worked with Trapani, but Skidmore had not. Seiff worked his way through various management positions, while Skidmore remained in the same position for which he was hired. In April 2000, Seiff left Bay 101 to work at another card room. Trapani then promoted Skidmore to Seiff's former position of poker games manager.

In October 2000, Ron Werner became the general manager of Bay 101. In November 2000, Seiff returned to work at Bay 101 as floor manager/casino shift

manager. This position was below the poker room manager position that he had held in April 2000.

In February 2001, Trapani created the position of casino manager, and promoted Skidmore to this position. Skidmore had previously recommended Seiff for the casino manager position, and he asked Trapani why he was not offering the job to Seiff. Trapani replied that Seiff "wasn't ready." However, he promoted Seiff to poker games manager, which had been Skidmore's position. Seiff reported to Skidmore, and Skidmore reported to Werner.

In August 2002, the City of San Jose enacted a gambling ordinance that required Bay 101 to close between 2:00 and 6:00 a.m. daily, and eliminated backline betting. This ordinance had a significant impact on Bay 101. Since Bay 101 suffered a substantial decline in its gross revenues, it laid off over 200 employees, and filed for bankruptcy. About two weeks after the ordinance went into effect, Bay 101 obtained a stay of enforcement, and thus was able to resume operations 24 hours a day and to return to backline betting.

However, even after Bay 101 obtained the stay of enforcement, Bay 101's business did not return to its former levels by October 2002. As of October 2002, Bay 101's profits were down approximately 12 percent. By November 2002, profits were down eight percent. Trapani then decided that Bay 101's management team was responsible for this failure, because it was not responding to the market appropriately. He also believed that employee morale was low, and that many members of the management team had "given up." Trapani's solution was to change some of the games and to reorganize the management team. He discussed his proposal with Werner and Timothy Bumb, president, shareholder, and member of Bay 101's board of directors, and they told him to do whatever he thought was necessary.

In late November 2002, Trapani chose Seiff, who was 44 years old, to fill the position of casino manager. He then moved Skidmore, who was 58 years old, to the casino shift manager position. Trapani chose Seiff as casino manager, because he wanted someone that he "could count on to understand what [he] wanted done," and was comfortable working with him. Trapani believed that Skidmore "had given up" and did not work well with Werner. While he did not think that Skidmore had done anything wrong, he "was more comfortable that with Mr. Seiff [he] could turn the club around." Trapani did not consider the issue of age in making his decision. According to Trapani, Seiff had no influence on his decision. Trapani also made other changes as part of the reorganization: (1) Jimmy McKee (age 60) was moved from California games manager to casino shift manager; (2) Joseph Schablaske (age 44) was moved from lead floor/ casino coordinator to casino coordinator; and (3) Ronald Zuber (age 64) was moved from casino shift manager to proposition player, and was no longer part of the management team.[1] Tom Bosch (age 52), Frank Lovaglia (age 58), and Mike Sakamoto (age 59) remained in their positions as casino shift managers. Susan Deeb (age 49) remained in her position as casino manager. The positions of California games manager and poker manager were eliminated. Thus, Bay 101 rebutted Skidmore's prima facie showing by presenting substantial evidence that it had legitimate, nondiscriminatory reasons, unrelated to his age, for its decision.

E. Skidmore's Rebuttal

The burden then shifted to Skidmore to raise a triable issue of fact by presenting substantial evidence that Bay 101's reasons were pretextual or motivated by discriminatory animus. The employee's rebuttal obligation is not

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[1] Skidmore's salary was reduced $30,000 per year while McKee's and Zuber's salaries were reduced at least $25,000 per year.

satisfied where "the employee simply show[s] the employer's decision was wrong, mistaken, or unwise." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807 (*Horn*).) "[T]he employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted nondiscriminatory reasons." (*Morgan v. Regents of the University of California* (2000) 88 Cal.App.4th 52, 75, citations and quotation marks omitted.)

Skidmore next contends that Bay 101's showing was inadequate because its claim of financial difficulties was based on Trapani's "uninformed beliefs" rather than credible evidence. He notes that Bay 101 failed to provide any financial documentation, such as monthly profit and loss statements, balance sheets or income and expense statements, that demonstrated its deteriorating financial condition. However, in addition to Trapani's declaration, Bay 101 produced its bankruptcy filings and summarized revenue reports for the period when the ordinance was in effect. These documents established that the ordinance had a significant negative impact on Bay 101's financial condition. Moreover, Skidmore's view that Bay 101 "rebound[ed] *immediately* upon the stay of enforcement of the ordinance" , is not supported by the record. Skidmore concedes that, by the end of September 2002, revenues were 12 percent lower than before implementation of the ordinance. He also concedes that revenues were still down by 8 percent in November 2002. Prior to the enactment of the ordinance, daily revenues averaged approximately $100,000. A 10 percent reduction (the mean between the losses experienced in September and November 2002), that is, $10,000 per day would result in a loss of $3.6 million per year. This potential scenario clearly justified some action by Trapani to improve revenues.

Skidmore also does not dispute that Bay 101 filed for bankruptcy, but argues that this action "was defensive and an aid to keeping the City of San Jose at bay until the challenge to the ordinance could be completed." He further claims that Werner told employees that Bay 101 was not experiencing financial difficulties. However, the trial court ruled that this evidence was inadmissible. Since Skidmore did not appeal the trial court's ruling, we may not consider this evidence. (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 612 (*Artiglio*).)

Skidmore next argues that there was no restructuring of the card room operations, and thus this reason for demoting him was pretextual. The record does not support his argument. Trapani eliminated the two management positions of California games manager and poker manager. He also placed certain employees in different management positions, thereby changing their duties and allowing for improvement in their performances. The mere fact that all of the managers retained a position at Bay 101 does not mean that there was no restructuring of the organization.

Skidmore next claims that Trapani incorrectly concluded that Seiff was more qualified to be casino manager than he was. In his opinion, Seiff did not have prior experience as a casino manager, lacked Skidmore's knowledge and experience in gaming, had no basic management skills, and did not have good relationships with subordinates. However, Skidmore also testified that Seiff was "very qualified" for the position of casino manager, and had previously recommended him for the position. In any event, Skidmore's views are insufficient to create a triable issue of fact. "[T]he issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers. [Citations.]" (*McCoy v.* WGN *Continental Broadcasting Co.* (7th Cir. 1992) 957 F.2d 368, 373.) Thus, courts do not second-guess business

decisions where the decisionmaker honestly believed that the plaintiff was not the most qualified candidate. (*Ibid.*) Here, as previously noted, Trapani provided several reasons why he believed Seiff was the superior candidate for the position, and Skidmore has not demonstrated that a reasonable factfinder would find them incredible.

Skidmore also disagrees that he and the other managers had quit trying. He argues that if this were the case, then Trapani should have fired all the managers. Skidmore's argument, however, actually supports the finding that age did not play a factor in the reorganization. Since all of the managers were over 40 years old and fell into a protected category (Gov. Code, § 12926, subd. (a)), Trapani's decision to retain them could not have reflected a discriminatory motive.

Skidmore next contends that he produced direct evidence of age bias. He claims that Trapani had stated on two or three occasions that he was concerned about the age of Bay 101's management team, and that "the younger men 'on the bench' were not ready to manage."

To determine whether an employer's comments are relevant on the issue of discriminatory intent, courts will consider: (1) the identity of the speaker; (2) the substance of the discriminatory statements; (3) the temporal connection between the statement and the challenged action; and (4) whether the statement supports other evidence of pretext. (*Ercegovich v. Goodyear Tire & Rubber Co.* (6th Cir.) 154 F.3d 344, 354-357 (*Ercegovich*).)

A discriminatory statement is relevant when the person making the statement is responsible for the challenged action, or had some influence over the action. (*Ercegovich, supra,* 154 F.3d at pp. 354-355.) Here it was Trapani's decision to change Skidmore's position from casino manager to casino shift manager. However, the substance of his comments tends not to prove discriminatory intent. "Isolated and ambiguous comments are too abstract, in

addition to being irrelevant and prejudicial, to support a finding of age discrimination." (*Id.* at p. 355, internal citations and quotation marks omitted.) When Trapani made these statements, he was expressing concern about the management potential of the younger men. He made no comments about the abilities of the older men or the need to replace them. One could interpret the statements as reflecting a concern that when the older members of the management team retired, there would be no one qualified to replace them. Thus, the statements were ambiguous and irrelevant.

The temporal connection between the statements and Skidmore's demotion also tends to establish the limited probative value of the statements. Skidmore believed that the statements were made sometime within the year before the reorganization. Statements made two weeks before an employee's termination were held relevant (*Santiago-Ramos v. Centennial P. R. Wireless* (1st Cir. 2000) 217 F.3d 46, 55), while statements that were made more than six months before the challenged action were held to have been too remote in time. (*Walden v. Georgia-Pacific Corp.* (3rd Cir. 1997) 126 F.3d 506, 516.) Given the ambiguous nature of Trapani's statements, they were not temporally close enough to his demotion to have any probative value.

Trapani's statements also do not support any other evidence that he was motivated by discriminatory intent. Thus, since the statements are irrelevant, they do not raise a triable issue of fact as to intent.

Skidmore then focuses on remarks made by Seiff. On one occasion, Seiff told Skidmore that "it was his opinion that 'gaming is a young person's business.'" On another occasion, Seiff told Debbie Ely "that if she quit, he would hire Debbie's daughter." In January 2004, Seiff said to Ely, "You know, Debbie, this is a young person's business. But we'll keep you forever." In 1998, Seiff told John Sess, another employee at Bay 101, that "management wanted younger

people on the floor and he wouldn't consider [him] because of [his] age."[2] However, these remarks are irrelevant, because Seiff was not involved in the decision to demote Skidmore. (*Cucuzza, supra,* 104 Cal.App.4th at pp1045-1046.) Despite this fact, Skidmore claims that Seiff had "multiple opportunities to discuss Trapani's motivations for the staff reorganization" and enjoyed a close relationship with Trapani. He points out that Seiff was present when Trapani met with each manager to discuss the reorganization. Such evidence is merely speculative as to Trapani's state of mind and thus insufficient to create a triable issue of fact. (*Horn*, *supra*, 72 Cal.App.4th 798, 807.) Even if Trapani was aware of Seiff's beliefs, there is no evidence that he shared them.

Skidmore next argues that he produced evidence that Trapani and Seiff discussed his demotion months before it occurred, creating the inference that business reasons were unrelated to the reorganization of the management team. Seiff told Angela Fan in August or September 2002, that "he thought Charlie Skidmore was old enough to be retired soon and that he would be the next Casino Manager when that happened." This statement merely reflects Seiff's view that Skidmore might retire soon and that he would be the individual to replace him. It does not indicate that Trapani and Seiff had any discussions prior to the reorganization about Trapani's intent to ensure that Skidmore would retire.

Skidmore argues that Bay 101's claim of financial necessity does not explain the demotions of three of the older managers and the promotion of the four youngest managers. Skidmore has mischaracterized the record. The four

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[2] In response to a question by Zuber's wife as to why her husband had been demoted, Seiff told Zuber's wife that Trapani wanted "younger people in management." The trial court found this statement was inadmissible. Since Skidmore did not appeal this ruling, this evidence may not be considered by this court. (*Artiglio, supra,* 18 Cal.4th at p. 612.)

youngest managers were Seiff, Bosch, Deeb, and Schablaske. Bosch and Deeb's positions were not changed in the reorganization. Schablaske's position was changed from lead floor/casino coordinator to casino/coordinator, but the record does not indicate whether this was a promotion. Thus, only one of the four youngest managers was promoted. Of the five oldest managers, Skidmore, McKee, and Zuber, were demoted, while Lovaglia and Sakamoto remained in the same positions.

An employee may produce statistical evidence regarding an employer's practices to show that the challenged action is consistent with a pattern of discrimination. (*McDonnell Douglas, supra,* 411 U.S. at pp. 804-805.) However, the statistics must be based on a sample size that is large enough to have predictive value. (*Palmer v. United States* (9th Cir. 1986) 794 F.2d 534, 539.) Here there were nine employees on the management team. One of the youngest employees was promoted, while three of the oldest managers were demoted. This sample size was too small to be statistically significant. (*Guz*, *supra*, 24 Cal.4th at pp. 367-368; see e.g., *Sengupta v. Morrison-Knudsen Co.* (9th Cir. 1986) 804 F.2d 1072, 1074 [sample size too small where four out of five employees in protected class were laid off].) Moreover, Skidmore failed to offer any expert testimony to explain the significance, if any, of the statistics. Thus, this contention fails.

We conclude that Skidmore did not produce sufficient evidence that Bay 101's reasons for demoting him were untrue or pretextual, or that Bay 101 acted with discriminatory motive such that a factfinder would conclude Bay 101 engaged in age discrimination. Accordingly, the trial court properly granted summary judgment in favor of Bay 101.

II. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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McAdams, J.